IN THE SUPREME COURT FOR THE STATE OF NEVADA

DEANGELO R. CARROLL,
Appellant,
v.

THE STATE OF NEVADA,
Respondent.

No. 64757

APPELLANT'S PETITION FOR REHEARING

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APPELLANT'S PETITION FOR REHEARING

Deangelo Carroll petitions this Court to rehear this appeal and reconsider the panel decision of April 7, 2015 under the authority of NRAP 40. In this decision, the panel concluded that "the district court erred in denying Carroll's motion to suppress his statements to police because police subjected Carroll to a custodial interrogation without advising him of his *Miranda* rights." *April 7, 2015 Opinion* at 2. Despite this conclusion, however, this Court did not reverse because it determined that the "error was harmless beyond a reasonable doubt." *Id.*

This result is wrong in two ways. First, in reaching its conclusion that the error was harmless beyond a reasonable doubt, this Court overlooked or misapprehended the correct standard to measure the harm of the district court's error. Under the correct standard, the introduction of Carroll's two-hour confession to the jury cannot be considered harmless beyond a reasonable doubt.

The second problem with the result is that it depends on an argument that was never advanced and never suggested *until* this

Court raised it *sua sponte* during the State's portion of the oral argument. Because the State was "the beneficiary of constitutional error," the State had the burden "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *See Chapman v. California*, 386 U.S. 18, 24 (1967). But because the State did not propose any potential harmlessness in its briefing, it was improper for this Court to rest its decision on that ground.

For these reasons, Carroll's appeal should be reheard.

A. Harmlessness requires a consideration of more than remaining, unbarred evidence

This Court's harmlessness analysis consists of only one paragraph. It first declares that "the State has shown that the error" of admitting Carroll's statement "was harmless." *April 7, 2015 Opinion* at 22. It then cites a case for the assertion that "harmless error analysis" can be applied "to a statement admitted at trial in violation of *Miranda*." *Id.* (citing *Boehm v. State*, 113 Nev. 910, 916, 944 P.2d 269, 273 (1997)). The paragraph then asserts that beyond Carroll's confession, "the district court properly admitted other powerful evidence

of his guilt." *Id.* What that other evidence is, and why it was so powerful, is not described.

The problem, however, is that the Court appears to have only considered the weight of the other evidence to render its decision. This is incorrect. When constitutional error has occurred, the question is not merely if there was sufficient, even powerful, evidence to convict the defendant otherwise. If it were so, a directed verdict in the State's favor could be upheld if the reviewing court decided that the evidence against the appellant was overwhelming. *Cf. Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

The question to be asked—and what the State is supposed to prove—is whether the verdict would unquestionably have been the same without the constitutional error. *See, e.g.*, *Diomampo v. State*, 124 Nev. 414, 428, 185 P.3d 1031, 1040 (2008). To answer that question in the affirmative in this case, the State must show beyond a reasonable doubt that the admission of Carroll's confession "did not contribute" to his conviction. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). From this perspective, it's impossible to say that admission of Carroll's confession was harmless beyond a reasonable doubt.

First, one must take stock of the potency of a confession:

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Fulminante, 499 U.S. at 296 (internal quotation omitted). So, while the State may have presented other evidence that implicated Carroll, his "full confession in which [he] discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." *Id.*

The State's own actions regarding the confession display its importance to this case. Although this list is far from exhaustive, the record shows that the State described and played portions of the confession during its opening statement, *see* 6 AA 1169–73; it played the whole confession, intermixed with discussion from one of the detectives involved, during the trial, *see* 7 AA 1425–35; the State also sought to admit a transcript of Carroll's statement, *see* 7 AA 1425, 12

AA 2463–577; and the State replayed (at least) portions during its closing argument and further discussed it, *see* 9 AA 1840–43, 1851–54, 1860–62.

So, in both the purely legal sense as well as practical sense, Carroll's confession was central to the State's case. On that basis alone, it is unreasonable to say that its erroneous admission couldn't have influenced the jury, especially beyond a reasonable doubt. But this conclusion holds when you look at the State's other evidence. It is far from overwhelming, and it can't stand on its own.

Beyond Carroll's confession, the other key pieces of evidence the State offered to prove Carroll's culpability were the recordings he made for the police and the testimony of Rontae Zone. Zone's testimony is dispatched easily enough. His testimony was only available through a promise of immunity. *See* 6 AA 1311–13. Indeed, Zone readily admitted that he was only testifying, and would say pretty much anything, as long as he didn't end up charged. *See* 6 AA 1378–80. Beyond that, Zone admitted that he had smoked pot the morning of the day he testified. *See* 6 AA 1327. Even with Carroll's confession, it's hard to believe that the jury could give it much weight, if it gave it any. Indeed, to bolster

this weak testimony, the State's closing argument repeatedly showed how Carroll's confession corroborated what Zone said. *See* 9 AA 1851–55. Without Carroll's confession, Zone's admittedly self-serving testimony is nothing.

As for the recordings Carroll made for the police, "neither the State nor defense argued that [Carroll's] statements were true, in fact, both explained that his statements were instead designed to produce inculpatory statements." *State's Brief* at 46–47. Well, at least that was the State's tune on appeal. At trial, the State took a slightly different tack. It still argued that Carroll intended to elicit inculpatory statements, but the State *also* argued that Carroll's own comments proved his guilt. However, to make that argument, the State repeatedly cited back to the confession:

> No, ladies and gentlemen, because on May 20th, days before the recording's even happened, Deangelo, telling the police what actually happened, says that. It's not a script. It's not made up. It's not been fed to him by the police. You know that from listening to it from his own statement before the record.
>
> (Audio played)
>
> *This is how you know that the recordings are accurate.* This is how you know that when, on the recording

> Deangelo speaks to them and they say that, it's, in fact, what they said because he's telling this to the police before the recordings even occur. So don't fall into the trap of thinking that everything that's incriminating that comes of those recordings was just spoon fed through Deangelo by the cops. It is actually what happened.

9 AA 1861 (emphasis added).

In light of the State's emphasis and repeated reliance on Carroll's confession to prove its case, even with all the other evidence that was introduced, it simply cannot be said that the admission of Carroll's confession had no effect on the verdict. *Cf. Chapman*, 386 U.S. at 23–24.

This conclusion becomes ironclad when this case is compared to *Arizona v. Fulminante*. In *Fulminante*, a defendant gave two confessions. The first, to a government's informant, was determined to be involuntary, while the second, to the informant's wife, was without legal flaw. *See* 499 U.S. at 284 & n.1, 287–88, 297. Both were introduced at trial, and the defendant Fulminante was convicted and sentenced to death. *Id.* at 284. Even though the second, unsullied confession gave more details of the crime, *see id.* at 312 (dissent), the Supreme Court nevertheless determined that the use of the first, involuntary confession was not harmless beyond a reasonable doubt. *Id.*

at 295–302. And two striking comparisons can be made between Carroll's prosecution and the *Fulminante* decision. Like in this case, the prosecutors in *Fulminante* relied heavily on *all* of the defendant's statements to achieve a conviction. *Id.* at 297–98. And like in this case, the prosecutors relied on an invalid confession to prove the reliability of other statements. *Id.* at 298–300. Based on these similarities, the admission of Carroll's confession cannot be ruled harmless beyond a reasonable doubt.

B. The State waived the right to argue harmlessness by failing to raise it in its briefing

Under NRAP 40, a party that seeks rehearing is supposed to cite its briefs for the point of law it argues that this Court overlooked. NRAP 40(a)(2). Similarly, when a party argues that this Court has overlooked a material fact, a similar citation is required. *Id.* This emphasis goes to show the primacy of briefing as the way to present a party's arguments to this Court.

Of course, this is not the only rule that emphasizes the primacy of briefing. Similarly, NRAP 28(a)(10) requires an appellant to put forth his "contentions and the reasons for them, with citations to the

authorities and parts of the record on which the appellant relies." NRAP 28(b) requires the same of the respondent. NRAP 28(e)(1) requires citations to the record for every factual assertion made in a brief. A failure to meet the requirement of either rule has regularly resulted in this Court refusing to even consider the issue raised. *See, e.g.*, *Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 127 Nev. ___, 256 P.3d 958, 961 n.2 (2011); *Rivero v. Rivero*, 125 Nev. 410, 439 n.10, 216 P.3d 213, 233 n.10 (2009); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). This holds true even when the respondent in an appeal commits the error. *See, e.g.*, *State, Nevada Employment Sec. Dep't v. Weber*, 100 Nev. 121, 123, 676 P.2d 1318, 1319 (1984).

And yet, despite this tradition and authority, Carroll must now seek rehearing on an argument that was not raised at all in the State's brief. In fact, the State did not even raise the argument itself during oral argument. It was this Court that raised the possibility of harmlessness in oral argument halfway through the State's response.

The problems this raises are serious. First, the State's belated argument is both factually and legally untenable. The State's case

below was so inextricably intertwined with the illegal confession that it is impossible to say that it had no effect on the verdict. Just counting the number of times during closing argument that the State asked, "What did Deangelo say to police?" or something similar proves the point. *See, e.g.*, 9 AA 1852.

Had Carroll known that the State would be allowed to argue harmlessness at oral argument, he could have prepared to rebut the argument and show how the case the State presented at trial made an argument for harmlessness futile. By soliciting that argument from the State, this Court overlooked this Court's decision in *Polk v. State*, which determined that this sort of sandbagging is prejudicial to the appellant. *See* 126 Nev. 180, 186, 233 P.3d 357, 360 (2010). Moreover, relying on arguments first presented during oral argument is detrimental to the orderly disposition of justice. This Court, despite the new Court of Appeals, is still one of the busiest appellate courts in the nation. *See e.g.*, *Burke v. State*, 110 Nev. 1366, 1370, 887 P.2d 267, 269 (1994). Deciding an appeal on a late-formed, unbriefed argument risks an erroneous decision by this Court, as it did in this case. Such error must

then be addressed in subsequent petitions for rehearing and reconsideration *en banc*, further burdening this Court's workload.

Like any other litigant, the State's failure to raise an argument should result in a waiver of that argument. Allowing the State to raise new arguments after the rules prohibit it gives the State an unfair advantage over every other litigant.

In sum, under *Polk*, as well as the rules of appellate procedure generally, it was prejudicial to Carroll and procedurally improper to consider any argument from the State that its reliance on Carroll's confession was harmless beyond a reasonable doubt.

CONCLUSION

When this Court relied on contentions first presented during oral argument to affirm Carroll's conviction, it overlooked or misapprehended controlling law and overlooked material facts. The State's reliance on Carroll's confession to convict him can't be found harmless beyond a reasonable doubt. Considering the State's untimely argument was prejudicial to Carroll. Because of these errors, the Court should reconsider its decision.

DATED: May 16, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Century Schoolbook 14-point font.

2. I further certify that this petition complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

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DATED: March 16, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on May 16, 2016. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
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/s/ Mario D. Valencia
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